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No. 94-1771

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ANTHONY MARK DANIEL,

Petitioner,

v.

CITY OF TAMPA, FLORIDA;
AUDLEY EVANS, Executive Director,
Tampa Housing Authority,
in his official capacity,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents, CITY OF TAMPA, FLORIDA and AUDLEY EVANS, Executive Director, Tampa Housing Authority, respectfully restate the questions presented as follows:

I. WHETHER THE ELEVENTH CIRCUIT CORRECTLY APPLIED THE WELL DEVELOPED SUPREME COURT PRECEDENT IN THE AREA OF FIRST AMENDMENT FORUM ANALYSIS.

II. WHETHER THE OWNER OF A PUBLIC HOUSING COMPLEX HAS THE SAME RIGHT AS THE OWNER OF A PRIVATE APARTMENT COMPLEX TO ENFORCE TRESPASS LAWS ON ITS PROPERTY, PARTICULARLY WHERE ADEQUATE ALTERNATIVE AVENUES FOR EXPRESSIVE ACTIVITIES EXIST.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff:	Anthony Mark Daniel
Defendants:	City of Tampa and Audley Evans, in his official capacity as Executive Director of the Tampa Housing Authority

SUPREME COURT RULE 29-1
STATEMENT OF INTERESTED PARTIES

Joel F. Dubina
United States Circuit Judge

Floyd R. Gibson
Senior United States Circuit Judge

Phyllis A. Kravitch
United States Circuit Judge

Honorable L. Clure Morton
Senior United States District Judge

Honorable Elizabeth A. Kovachevich
United States District Judge

Honorable Charles R. Wilson
United States Magistrate Judge

Honorable Thomas G. Wilson
United States Magistrate Judge

Anthony Mark Daniel
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City of Tampa, Florida
Defendant/Respondent

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

The Respondents, City of Tampa, Florida (hereinafter "the City") and Audley Evans, in his official capacity as Executive Director of the Tampa Housing Authority (hereinafter "the Housing Authority"), respectfully request that this Court deny the Petition for Writ of Certiorari

submitted by Petitioner, Anthony Mark Daniel (hereinafter "Daniel").

STATEMENT OF THE CASE AND FACTS

Respondents respectfully submit that the following pertinent facts, most of which were specifically referenced in the decisions of the trial court and the Eleventh Circuit, do not appear in Daniel's recitation of the facts:

1. The Housing Authority owns the property on which Daniel was arrested for trespass after warning. The Housing Authority property is lawfully dedicated for residential use by low income individuals. The Housing Authority's mission is to provide "a safe and healthy physical environment for eligible low income citizens." [R2-50-4].

2. There is a serious drug problem on the Housing Authority property. [R5-76]. For example, one of the Housing Authority's public housing complexes has a rate of narcotics arrests which is five times higher than the rest of the City. The majority of people who commit criminal violations, including drug-related crimes, on Housing Authority property are non-residents. [R5-80]. Nearly 90% of those arrested on Housing Authority property are non-residents.

3. In order to deter crime, particularly drug transactions on Housing Authority property, access to the Housing Authority property is limited to lawful residents, invited guests, and those conducting official business through the enforcement of Florida's trespass after warning statute, § 810.09, *Florida Statutes*.

4. Use of the trespass after warning statute helps deter non-resident drug dealers and non-resident customers of

drug dealers from using Housing Authority property for the illegal narcotics transactions. [R2-50-195, 291]. Enforcement of the statute has made a significant impact upon the visible narcotics trade which takes place on Housing Authority property. [R2-50-291].

5. The City has established a special unit of police officers known as the "X-Ray Squad" to provide safety in public housing complexes and to improve community relations between the police and Housing Authority residents.

6. Police officers serving on the X-Ray Squad are trained in the enforcement of the Florida trespass after warning statute. They know that they cannot warn or arrest individuals who are (1) invited guests of Housing Authority residents, (2) authorized to be on Housing Authority property, or (3) present on the City-owned streets, sidewalks, rights-of-way and curbs which intersect and adjoin the Housing Authority property. [R5-50, 73].

7. The City-owned sidewalks, streets, rights-of-way and curbs which intersect and adjoin the Housing Authority property allow Daniel access to the Housing Authority residents, without requiring him to be physically present on Housing Authority property. [R2-50-26, 69].

8. When Daniel engages in expressive activity on the City-owned sidewalks and streets which adjoin or intersect Housing Authority property, he cannot be arrested for trespass after warning. In fact, Daniel has picketed, leafletted and demonstrated on the City property directly adjacent to the Housing Authority property without incident. [R5-49-50, 74, 103].

9. Daniel is subject to arrest for trespass after warning when he is present on Housing Authority property without authorization, whether he is engaging in expressive activity

or not. [R2-50-316]. Daniel is not be subject to arrest for trespass after warning, however, if he is invited on Housing Authority property by a resident or is otherwise authorized to be there. [R2-50-193, 289].

10. Daniel presented no evidence that the City's police department has a policy or practice of making arrests based upon the content of anyone's speech.

REASONS FOR DENYING THE WRIT

The decision under review was properly decided by the court of appeals. The court below correctly applied the well-developed Supreme Court precedent in the area of First Amendment forum analysis in concluding that enforcement of the Florida trespass after warning statute on Housing Authority property did not violate the First Amendment.

ARGUMENT

Rather than creating "an unprecedented and troubling exception to the First Amendment principles," as the Petitioner argues, the court of appeals correctly applied the well-developed Supreme Court precedent in the area of First Amendment forum analysis. *See, e.g. Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

Both the district court and the court of appeals correctly concluded the Housing Authority property was a non-public forum. This conclusion was based upon the record evidence that: (1) the Housing Authority has dedicated its property for use in providing a safe and healthy physical environment for low income citizens; and (2) access to Housing Authority property is restricted to residents, invited guests and those conducting official business. Moreover, as the Eleventh Circuit pointed out, Daniel made no showing that the Housing Authority has ever opened or designated its property for expressive activities by non-residents.

Daniel asserts that, since individuals reside on the Housing Authority property, public housing is "a unique public forum." The Housing Authority property generally consists of residential apartment complexes surrounded by lawns. The Housing Authority property is intersected and bounded by City-owned streets and sidewalks. Those streets and sidewalks are traditional public fora. However, their presence does not transform the Housing Authority property itself into a traditional public forum any more than any other street transforms all privately-owned property adjacent to it into a traditional public forum. *See United States v. Kokinda*, 497 U.S. 720, 727 (1990) ("[t]he presence of sidewalks and streets within the [military] base did not require a finding that it was a public forum").

Similarly, the mere fact that individuals reside on the Housing Authority property cannot transform the property into a public forum. *See Chapman v. Thomas*, 743 F.2d 1056, 1059 (4th Cir. 1984) (residential areas of dormitories located on state university campus were nonpublic fora), *cert. denied*, 471 U.S. 1004 (1985); *Shopco Distributing v. Commanding General*, 885 F.2d 167, 172-3 (4th Cir. 1989). If anything, the concept of a home is antithetical to the notion of a public forum.

If, as Daniel claims, the Housing Authority is a "unique public forum," the quiet and tranquility of this residential area would be at the mercy of all advocates of religious, social or political persuasion. The residents would have little or no recourse against such things as mass demonstrations and political rallies in their yards. Not only would the Housing Authority be denied the same right to determine the use of its property enjoyed by private property owners, but Housing Authority residents would not be afforded the same privacy protections as individuals living in private residences, simply because they live in public housing.

In short, Daniel's assertion that the court of appeals erred in failing to treat the Housing Authority as a "unique public forum" should be rejected. Acceptance of that argument would represent a radical departure from this Court's well developed forum analysis precedent.

Having concluded that the Housing Authority property is a non-public forum, the court of appeals then examined whether enforcement of the Florida trespass after warning statute on Housing Authority property was content-neutral and reasonable. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 46.

As to the first factor, the Eleventh Circuit observed that Daniel failed to present any evidence that he had been

arrested for trespassing because of a disagreement with his viewpoint. Instead, as the district court also found, Daniel's arrests were effected solely to prevent unlawful trespass.

The court of appeals also concluded that enforcement of the Florida trespass after warning statute on Housing Authority property was reasonable, given the evidence establishing: (1) the residential nature of the Housing Authority property[1]; (2) the rampant drug and crime problem that pervades the area; (3) the effectiveness of enforcement of the Florida trespass after warning statute in helping the Housing Authority to combat the drug and crime problem on its premises; and (4) the availability of closely adjoining City-owned sidewalks for leafletting, handbilling, and other expressive activities.

In short, the court of appeals correctly concluded that the Housing Authority property is a non-public forum and that enforcement of the Florida trespass after warning statute on Housing Authority property is reasonable and not an effort to suppress speech based upon its content.

Contrary to the Petitioner's argument, the Eleventh Circuit did not create an exception to *Martin v. Struthers*, 319 U.S. 141 (1943), limited only to public housing residents. For several reasons, *Martin* is fundamentally distinct from this case.

In the first place, the law challenged in *Martin* was aimed directly at expressive activities. The ordinance challenged in that case prohibited door to door solicitation.

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[1] The Housing Authority's interest in providing safe living conditions for its residents is certainly greater than the Postal Service's interest in regulating solicitation in *United States v. Kokinda*, 497 U.S. 720 (1990), or the city's interest in eliminating visual clutter in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

Here, the challenged statute, § 810.09, *Florida Statutes*, is not directed at activities which are inherently expressive. Rather, it prohibits unauthorized physical presence on the property of another. *Cf. Martin*, 319 U.S. at 147-48 (referring to the alternative of trespass laws punishing persons who enter property after being warned to keep off); *Breard v. City of Alexandria, La.*, 341 U.S. 622, 644 (1951).

This Court has rejected constitutional challenges to the enforcement of laws which forbid certain conduct for legitimate reasons unrelated to the suppression of free expression, even where conduct violating the laws was undertaken for communicative purposes. *See, e.g. United States v. O'Brien*, 391 U.S. 367 (1968); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

More importantly, the Housing Authority, unlike the city in *Martin*, is not acting as a sovereign to foreclose expressive activity on privately-owned property. Instead, the Housing Authority is acting in a proprietary capacity, enforcing a facially neutral trespass law on property it owns.[2] *See Intern. Soc. for Krishna Consciousness v. Lee*, ____ U.S. ____, ____, 112 S. Ct. 2701, 2705, 120 L.Ed.2d 541 (1992) ("[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject").

Owners of private property, including private apartment complexes, have the right to enforce criminal trespass laws

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[2] The Petition refers to the Housing Authority property as "government-subsidized public housing." However, this characterization is somewhat misleading. As the district court found, the Tampa Housing Authority owns the subject property. [Petition, Appendix "B," p. 10a].

on their premises. *See, e.g. Hall v. Com. of Virginia*, 188 Va. 72, 49 S.E.2d 369, *appeal dismissed*, 335 U.S. 875 (1948). There is no reason why the Housing Authority, while acting in a proprietary capacity, should not enjoy the same property rights as the owner of a private apartment complex.

As the Court recognized in *Adderley v. Florida*, 385 U.S. 39 (1966):

> Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute. . . .
>
> The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated. . . .
>
> [The petitioners'] argument has as its major unarticulated premise the assumption that people who want to propagandize protest or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on. . . . We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purposes.

385 U.S. at 47-8.

Finally, the unique facts of this case make it wholly distinguishable from *Tucker v. Texas*, 326 U.S. 517 (1946) and *Marsh v. Alabama*, 326 U.S. 501 (1946). *Tucker* and *Marsh* involved bars to expressive activities in entire towns, at least portions of which were freely accessible and open to

the public. *See Breard v. City of Alexandria, La.*, 341 U.S. at 643 ("[i]n neither case was there dedication to public use but it seems fair to say that the permissive use of the ways was considered equal to such dedication").

Here, the Housing Authority property is a relatively confined area and access to the property is restricted to residents, invited guests and other authorized individuals. Moreover, in contrast to *Tucker* and *Marsh*, the Housing Authority has made no effort to bar expressive activities in all areas, including traditional public fora such as adjoining sidewalks and streets.

In this case, closely adjoining sidewalks and rights-of-way are available for leafletting, handbilling and other expressive activities. Indeed, the evidence established that no effort was made to arrest Daniel on a number of occasions when he engaged in expressive activities in those areas. Because the Housing Authority's public housing complexes are relatively confined areas, the ability to handbill and leaflet on the adjoining sidewalks constitutes an adequate and practical alternative to door to door solicitation. In *Martin*, *Tucker* and *Marsh*, no similar alternative channels for communication were readily available. In summary, this case turns on its own unique facts, which render it wholly distinguishable from *Martin*, *Tucker* and *Marsh*.

CONCLUSION

The Court should decline to exercise jurisdiction over this matter because the case presents no issue appropriate for the Court's review, and because the court of appeals' ruling was not in error.

Respectfully submitted,

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